United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

NO.77-6102

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WALTER & MARIA GREEN,

Plaintiffs-Appellees-
Cross-Appellants,

and

PAT WALKER,

Plaintiff-Intervenor-Appellee-
Cross-Appellant,

v.

PAUL R. PHILBROOK, ET AL.,

Defendants-Appellants-
Cross-Appellees.

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UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF VERMONT

REPLY BRIEF AND CROSS-APPELLEE'S BRIEF FOR THE SECRETARY OF HEALTH, EDUCATION AND WELFARE

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

GEORGE W. F. COOK,
United States Attorney,

LEONARD SCHAITMAN,
MICHAEL F. HERTZ,
Attorneys,
Appellate Section, Civil Division,
Department of Justice,
Washington, D. C. 20530.

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I. While appellees' arguments have some facial appeal, a detailed understanding of the basis of their argument reveals that their position is based on a hyper-technical rule of statutory construction, rather than a realistic evaluation of the statutory scheme as a whole. To point up

the deficiencies in appellees' position, the government files this reply brief.

1.) As we demonstrated in our main brief, both the literal language of the AFDC statute, and the underlying purpose of that Act view children as the primary beneficiaries of the program and thus in the truest sense of the word "recipients" of AFDC benefits. See Appellant's Brief at 9-12. Appellees have not shown that the Secretary's interpretation is in anyway inconsistent with the fundamental purposes of the Act or the significant interest of sound administration of the AFDC program.

On the other hand appellees' primary argument is based on their interpretation of 42 U.S.C. § 602(a)(26) -- a section that ties the collaterally related Child Support Program into the basic AFDC grant program. Appellees' case depends on a rigid interpretation of 42 U.S.C. § 602(a)(26) that blindly turns on whether and where the word "child" appears. Such a hyper-technical argument should not be allowed to frustrate clearly important administrative goals. In any event we now further demonstrate that appellees' technical construction argument affords an insufficient basis to rebut the Secretary's interpretation.

It is true that 42 U.S.C. § 602(a)(26) used the word "child" separate and apart from the phrase "applicant or recipient," whereas 42 U.S.C. § 602(a)(25) does not. As we explained in our main brief not much, if any, significance

should be attached to this argument based on syntex. In the first place, as we stated, nothing in 42 U.S.C. § 602(a)(26) necessarily precludes the interpretation that a child could be called on to fulfill certain aspects of an "applicants or recipients" responsibilities imposed by that section. Appellant's Brief at 12-13.[1/] Since the section could be read as imposing responsibilities on children, there is nothing inconsistent about interpreting "children" as a subset of the phrase applicant or recipient.[2/]

Second, Part B of Pub. L. 93-647, which is the same part in which 42 U.S.C. § 602(a)(25), and (26) are included, also includes a section which seems to contemplate children as recipients of AFDC benefits, inasmuch as Congress refers to "a child receiving aid under part A [AFDC] . . . ." Pub. L. 93-647, Section 453(c)(3), 88 Stat. 2353, 42 U.S.C. § 653(c)(3). Applying appellees' own rule of statutory construction, it would seem that where Congress refers to

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1/ This appears to be a reasonable interpretation given the provisions of Section 454(4)(B) & (5) of Pub. L. 93-647, 88 Stat. 2354-55, 42 U.S.C. § 654(4)(B), (5), requiring the state to seek support for "any child with respect to whom [an] assignment [under 42 U.S.C. § 602 (a)(26)] is effective."

2/ HEW's regulations with respect to child support payments paraphrase the statutory requirement. The regulations, however, provide sanctions only with respect to "the relative with whom a child is living." 45 C.F.R. § 232.11.

the obligations of "recipients" of aid, and in the same act also refers to "a child receiving aid," that children must have been intended to be included in the phrase "recipient." 3/

Third, the legislative history of the Child Support Program also supports the conclusion that Congress considered children to be recipients of aid. Thus in the applicable Senate Report continuous reference is made to the millions of recipients who now receive AFDC benefits. The specific numerical references made are clearly to all individual-recipients, including children. This is made clear by the additional reference to AFDC families when Congress wished to refer to the assistance unit. See 1974 U.S.C. Cong. & Admin. News 8145-46. Thus, the legislative history of the very section of the Act on which appellees rely, seems to contemplate individual children as recipients under the AFDC program.

Fourth, the premise of appellees' argument -- that Congress used the terms applicants, recipients or children

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3/ In our main brief we referred the court to a number of examples in the AFDC statute where Congress referred to "child[ren] receiving aid." We suggested that given the ordinary meaning of words one receiving aid is a "recipient." To the extent this terminology was used in enactments prior in time to Public Law 93-647, it must be remembered that "the provisions introduced by the amendatory Act should be read together with the provisions of the original section that were . . . left unchanged . . .., as if they had been originally enacted as one section." Kirchner v. Kansas Turnpike Authority, 336 F.2d 222, 230 (10th Cir. 1964). See also 1A Sutherland's Statutory Construction, § 22.34 (Sands ed. 1972).

with unwaivering consistency in 42 U.S.C. § 602, is simply incorrect. Congress used various terms to designate AFDC participants. See, e.g., 42 U.S.C. § 602(a)(4) ("any individual whose claim for aid to families with dependent children"); [4/] 42 U.S.C. § 602(a)(7) ("any child or relative claiming aid to families with dependent children"); 42 U.S.C. § 602(a)(8)(A)(i) ("each dependent child receiving aid to families with dependent children"); [5/] 42 U.S.C. § 602(a)(8)(A)(ii) ("a relative receiving such aid"); 42 U.S.C. § 602(a)(9) ("applicants or recipients"). In light of this draftmanship, and the previous examples supporting the proposition that children are recipients, Congress' separate use of the terms "recipients" and "child" in 42 U.S.C. § 602(a)(26) hardly furnishes a compelling indication that the Secretary's construction of 42 U.S.C. § 602(a)(25) was incorrect. [6/]

4/ See also 42 U.S.C. § 602(a)(10); (a)(12); (a)(19)(A).

5/ See also Appellant's Brief at 11-12.

6/ Plaintiffs say that Congress was deliberate in the language chosen in 42 U.S.C. § 602(a)(25) and (a)(26). Had the Congress been determined to make the distinction between children and "recipients," which plaintiffs want this Court to make, it would have undoubtedly sought to define these terms in the legislation itself, or at least in the legislative history. Absent these congressional references the word recipient should be given its plain and ordinary meaning.

Finally, contrary to appellees' contention, Appellees' Brief at 3-4, the social security number requirement was not enacted solely in connection with the child support provisions. The Senate Report, quoted at Appellees' Brief at 4, specifically refers to the social security number requirement "[a]s an additional tool in pursuing missing parents and to simplify the administration of the AFDC and Child Support Programs . . . ." (emphasis added). As our main brief demonstrates, Appellant's Brief at 17-21, utilization of childrens' social security numbers is of great importance in the efficient administration of the AFDC program.

In light of these examples supporting the conclusion that a child is a recipient for AFDC purposes, 7/ the foregoing indicates that plaintiffs statutory argument lacks sufficient substance to be allowed to frustrate the sound administrative techniques fostered by the Secretary's interpretation. 8/

7/ As we indicated in our main brief the conclusion that children were recipients for AFDC purposes was supported by the decision in Chambers v. Klein, 419 F. Supp. 569 (D. N.J. 1976). That decision was recently affirmed without opinion by the Third Circuit. No. 76-2338 (3d Cir. Sept. 6, 1977), pet. for reh'ring en banc denied Oct. 18, 1977.

8/ Much of the previous discussion also applies to plaintiffs' attempt to rely on 42 U.S.C. § 405(c)(2)(B)(i)(II). Appellees' Brief at 8. That argument is similarly based on the fact that the word "child" appears separate and apart from the phrase "applicant or recipient." Plaintiffs again have not attempted to consider the meaning of the Section which seemingly contemplates "children" as a subset of "applicant or recipient". See Appellant's Brief at 13-14.

2.) Plaintiffs also attempt to bolster their position by noting that 42 U.S.C. § 602(a)(25) requires only the furnishing of social security numbers and not applying for such numbers. Plaintiffs then postulate that Congress meant the requirement to apply to adults who would normally have social security numbers, but not children who as a group would more likely not have the number. Plaintiffs' reasoning is unpersuasive.

In the first place, Congress may have thought that it was unnecessary to include a specific provision providing for the application of social security numbers by children. 42 U.S.C. § 405(c)(2)(B)(i)(II), already on the books at the time of the enactment of 42 U.S.C. § 602(a)(25), adequately dealt with having children obtain social security numbers. More importantly, however, where Congress specifically requires that social security numbers be supplied, it need not enact into federal law the obvious precondition of having a social security number. Congress could properly assume that those without numbers would follow otherwise established procedures to seek such a number. It is the responsibility of AFDC applicants and recipients to fulfill the statutory requirements including applying for social security numbers, so they can be supplied.

3.) Plaintiffs also rely on the Privacy Act to support their argument. Pub. L. 93-579, 88 Stat. 1896, Section 7. They argue first that 42 U.S.C. § 602(a)(25) does not require the social security numbers of children, and that this requirement is imposed only by regulation. The fact of the matter is that the Secretary's regulation constitutes an interpretive regulation.[9/] Such an interpretation of a statute results not in regulations promulgated thereunder, but rather what the statute itself requires. The Secretary's interpretation, of course, is entitled to great weight. Appellant's Brief at 16. If the Secretary's interpretation is correct then the statute does require children to supply their social security numbers, and accordingly the prohibitions of Section 7(a) are not directly applicable.

Additionally, plaintiffs argue that the Privacy Act should be used to resolve any doubts about the interpretation of 42 U.S.C. § 602(a)(25) against disclosure of social security numbers. Assuming this argument had some validity prior to enactment of the Tax Reform Act, it is clearly no longer persuasive.

9/ That the Secretary's regulation is interpretative is made clear by the Secretary's comments. In responding to public comments that expressed concern about the social security number requirement, the Secretary in his comments prior to the final adoption of the regulations noted that he was not free to change the regulation because "furnishing [social security] numbers is specifically required by [the Act]." See 40 Fed. Reg. 27154 (June 26, 1975).

In the first place 42 U.S.C. § 602(a)(25) is itself a disclosure provision. The proper interpretation of its mandate should be controlled not by the Privacy Act, but rather by the broad administrative objectives it seeks to accomplish.[9a/] As we demonstrated in our main brief, requiring the disclosure of AFDC-childrens' social security numbers is consistent with these administrative objectives. Appellant's Brief at 17-21.

More importantly, however, the Tax Reform Act clearly indicates congressional sentiment that it is proper for state agencies administering a state welfare program to require all individuals affected by the program to disclose their social security numbers. In these circumstances the government submits that any doubt as to the meaning of 42 U.S.C. § 602(a)(25) should be resolved so as to be consistent with the Tax Reform Act, and its previously delineated legislative history, Appellant's Brief at 22-27 -- that is, to allow the same state agencies which administer both state general assistance programs and the federal-state AFDC program to use social security numbers for all participants. This is especially so since the Tax Reform Act, enacted after the Privacy Act, specifically delcares "any provision of Federal law heretofore enacted [which] is inconsistent with the policy set

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9a/ In fact the legislative history of the Privacy Act demonstrates concern that a prohibition against use of social security numbers would hamper efforts to prevent fraud or promote efficient administration. See, e.g., Transcript of Mark-Up Session on S. 3418, To create a Federal Privacy Commission at 24-40, reproduced at Legislative History of the Privacy Act of 1974, S. 3418 (Public Law 93-579), 94th Cong., 2d Sess. 29, 52-68 (Sept. 1976). Thus a narrow reading of 42 U.S.C. § 602(a)(25) is not justified, inasmuch as the statutory exception to Section 7 also represents significant legislative concerns.

forth . . . shall . . . be null, void, and of no effect." 42 U.S.C. § 405(c)(2)(C)(ii). [10/]

Finally, plaintiffs argue in their brief that the Secretary violated Section 7(b) of the Privacy Act because no disclosure was made of the source of the social security number requirement or how the number was to be used. Appellees' Brief at 10. In the first instance the Secretary's regulations make clear that the source of the requirement is 42 U.S.C. § 602(a)(25). 45 C.F.R. § 232.10(g). Beyond this the Secretary's regulations require the states to further notify the applicant or recipient as to the source of the requirement, and the fact that the social security number will be utilized in the administration of the AFDC program. 45 C.F.R. § 232.10(g). In a federal-state program, administered on a day-to-day basis by the state agencies, the Secretary submits that this notice fully complies with the federal

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10/ The fact that the literal language of the Tax Reform Act is not applicable to the AFDC program is not decisive. Congress could have reasonably assumed that a social security number requirement with respect to the AFDC program had already been imposed by 42 U.S.C. § 602(a)(25). The significance of the Tax Reform Act is that it is the most recent expression of congressional sentiment with respect to the use of social security numbers in the administration of governmental assistance programs. In this regard it is an appropriate reference for judging the scope of 42 U.S.C. § 602(a)(25).

government's responsibilities under Section 7(b) of the Privacy Act. Certainly plaintiffs have pointed to no specific statutory language or legislative history indicating that the above notice is insufficient in the circumstances of this case.

In any event plaintiffs' argument based on Section 7(b) is raised for the first time on appeal. None of plaintiffs' trial court pleadings request any relief based on Section 7(b) of the Privacy Act. No factual record exists whatsoever on which to postuate alleged violations of Section 7(b) of the Privacy Act. Accordingly, the issue is not properly raised in this Court. Besides, even if plaintiffs' Section 7(b) argument were persuasive, and this Court were inclined to require the federal government to further explain the use of the social security number, this would not be a sufficient ground for generally invalidating the social security number requirement of 42 U.S.C. § 602(a)(25). See, e.g., Chambers v. Klein, 419 F. Supp. 569, 580 (D. N.J. 1976), aff'd per judgment order No. 76-2338 (3d Cir. Sept. 6, 1977), pet. for reh'ring en banc denied Oct. 18, 1977.

II. Plaintiffs have filed a cross-appeal from the district court's refusal to certify this cause as a class action. In the conclusion to their brief plaintiffs request that the denial of class certification be reversed, and that a class action be certified in this Court. The government submits that the decision of the district court on this point is correct, and does not require reversal.

In the first instance whether the requirements of F.R.Civ.P. 23 are met, and whether the case should proceed as a class action is largely a matter left to the discretion of the district court. Wright v. Stone Container Corp., 524 F.2d 1058, 1061 (8th Cir. 1975); Clark v. Watchie, 513 F.2d 994, 999-1000 (9th Cir.), cert. denied, 423 U.S. 841 (1975); City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295 (2d Cir. 1969); Schneider v. Margossian, 349 F. Supp. 741, 745-46 (D. Mass. 1972).

The district court properly noted, and plaintiffs admit that their request for class certification, coming as it did two weeks after the decision on the merits, was untimely. F.R.Civ.P. 23(c)(1) requires that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Furthermore Vermont District Court Local Rule No. 11(3) requires that plaintiff move for a class determination within 90 days after filing of the complaint. Untimely application for certification is a proper ground for denying certification. See, e.g., Yulio v. Moore-McCormick Lines, Inc., 387 F. Supp. 872, 877 (S.D. N.Y. 1975). Plaintiffs, of course, bear the burden for timely filing. Glodgett v. Betit, 368 F. Supp. 211, 213-14 (D. Vt. 1973), aff'd sub nom Philbrook v. Glodgett, 421 U.S. 707 (1975); Carracter

v. Morgan, 491 F.2d 458, 459 (4th Cir. 1973). In these circumstances the district judge's refusal to certify a class prior to its decision on the merits and its denial of plaintiffs' post-decisional motion for certification was not error.

Plaintiffs also argue that notwithstanding the untimeliness of their request for certification, the district court's denial of their post-decisional motion for class certification "was an abuse of discretion." The only authority on which they rely is the Seventh Circuit's decision in Jiminez v. Weinberger, 523 F.2d 689 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976). While that case indicates that courts have the power in non-(b)(3) cases to certify a class after a decision on the merits, the opinion of then Judge Stevens clearly indicates that pre-decisional certification is generally the appropriate way to proceed. In any event it can hardly be contended that the district judge's refusal to certify a class after the decision on the merits is a clear abuse of discretion.[11/] See Watson v. Secretary of HEW, No. 76-2589 (6th Cir. Sept. 14, 1977).

11/ Plaintiffs contend that they delayed their motion for class certification until a determination was made on the government's jurisdictional contentions raised on its motion to dismiss. In the first place the government's motion to dismiss was coupled with its alternative motion for summary judgment. Additionally, plaintiff itself moved for summary judgment on its statutory claims, App. 31, and the government responded to the motion on its merits. Thus, it should have been clear that a decision on the merits was likely. Additionally, there is no authority for the proposition that

(footnote continued)

As the district court's oral denial of plaintiffs' motion for post-decisional certification recognized, in a suit that seeks primarily injunctive and declaratory relief it is not impermissible to allow the suit to proceed in the name of the plaintiff only, and to subsequently extend any relief to others similarly situated. See, e.g., Martinez v. Richardson, 472 F.2d 1121, 1126-27 (10th Cir. 1973); Ihrke v. Northern States Power Co., 459 F.2d 566, 572 (8th Cir.), vacated on other grounds, 409 U.S. 815 (1972); Stewart v. Wohlgemuth, 355 F. Supp. 1212, 1213 (W.D. Pa. 1972); Worthen Bank & Trust Co. v. National BankAmericard, Inc., 345 F. Supp. 1323 (E.D. Ark. 1972). In the present case plaintiffs have little cause to complain where the judgment order of the district court broadly enjoins the defendants "from requiring SSN's from ANFC-benefitted Vermont children as a condition of eligibility for benefits." App. 47. In these circumstances a reversal of the district court's denial of class certification is not required. See, e.g., Glodgett v. Betit,

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11/ (continued) a party may seek a ruling on jurisdiction prior to seeking class certification. Although perhaps desirable from plaintiffs' point of view the same one-way intervention problems discussed in Jiminez would be applicable to the jurisdictional issue as well.

368 F. Supp. 211, 218-19 (D. Vt. 1973), aff'd sub nom Philbrook v. Glodgett, 421 U.S. 707 (1975).[12]

CONCLUSION

For all the foregoing reasons, and for the reasons stated in our main brief, we respectfully request that the judgment of the district court on the merits be reversed, and the denial of class certification be affirmed.

Respectfully submitted,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

GEORGE W. F. COOK,
United States Attorney,

LEONARD SCHAITMAN,
MICHAEL F. HERTZ,
Attorneys,
Appellate Section, Civil Division,
Department of Justice,
Washington, D. C. 20530.

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12/ Beyond the untimeliness of plaintiffs' motion for class certification, and the fact that such certification is not always necessary in injunctive type actions, there exists another reason supporting the denial of this certification. The district court could properly reason that at least some members of the purported class might be in favor of the social security number requirement. Such individuals could believe that the furnishing of social security numbers would be effective in promoting efficient administration and in deterring fraudulent claims for AFDC benefits, thus leaving a greater pool of funds for legitimate AFDC beneficiaries including themselves. Since the present action might not in fact be in the best interests of all ANFC-benefitted Vermont families, plaintiffs may not be a proper representative for all potential members of the class they seek to certify.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 1977, I served the foregoing Reply Brief And Cross-Appellee's Brief For The Secretary Of Health, Education And Welfare upon counsel by mailing copies thereof, postage prepaid, to:

Zander B. Rubin, Esquire
Vermont Legal Aid, Inc.
55 Main Street
St. Johnsbury, Vermont 05819

M. Jerome Diamond, Esquire
Attorney General
Department of Social Welfare
Montpelier, Vermont 05602

Attention: Georgiana O. Miranda, Esquire
Assistant Attorney General

Michael F. Hertz

MICHAEL F. HERTZ, 202-739-4096
Attorney.